

VU Research Portal

The Public-Private Divide in English and Dutch Law: a Multifunctional and Context-Dependant Divide

van Ommeren, F.J.; Jurgens, G.T.J.M.

published in

Cambridge Law Journal
2012

DOI (link to publisher)

[10.1017/S0008197312000244](https://doi.org/10.1017/S0008197312000244)

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

van Ommeren, F. J., & Jurgens, G. T. J. M. (2012). The Public-Private Divide in English and Dutch Law: a Multifunctional and Context-Dependant Divide. *Cambridge Law Journal*, 71(1), 172-199.
<https://doi.org/10.1017/S0008197312000244>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

The Cambridge Law Journal

<http://journals.cambridge.org/CLJ>

Additional services for *The Cambridge Law Journal*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



THE PUBLIC-PRIVATE DIVIDE IN ENGLISH AND DUTCH LAW: A MULTIFUNCTIONAL AND CONTEXT-DEPENDANT DIVIDE

Gerdy Jurgens and Frank van Ommeren

The Cambridge Law Journal / Volume 71 / Issue 01 / March 2012, pp 172 - 199

DOI: 10.1017/S0008197312000244, Published online: 20 March 2012

Link to this article: http://journals.cambridge.org/abstract_S0008197312000244

How to cite this article:

Gerdy Jurgens and Frank van Ommeren (2012). THE PUBLIC-PRIVATE DIVIDE IN ENGLISH AND DUTCH LAW: A MULTIFUNCTIONAL AND CONTEXT-DEPENDANT DIVIDE. The Cambridge Law Journal, 71, pp 172-199 doi:10.1017/S0008197312000244

Request Permissions : [Click here](#)

THE PUBLIC-PRIVATE DIVIDE IN ENGLISH AND DUTCH LAW: A MULTIFUNCTIONAL AND CONTEXT-DEPENDANT DIVIDE

GERDY JURGENS* AND FRANK VAN OMMEREN**

ABSTRACT. *The main thesis of this article is that the public-private divide has to be considered as a multifunctional and context-dependant divide. This thesis is demonstrated by comparing English law and Dutch law. The authors describe two areas in which the divide is relevant: judicial review and the applicability of public law standards including human rights. In both legal systems discussions concerning the private-public divide relate to the transfer of power to private bodies. However, in the Dutch – continental – legal system the label ‘public law’ is used in fewer kinds of cases than in the English legal system. This remarkable finding might be explained by the characterization of the public-private division as multifunctional and context-dependant.*

KEYWORDS: *Judicial review; public law-private law boundary; Netherlands; England*

I. INTRODUCTION

Traditionally, the division between public and private law has not been rooted in the legal system of England and Wales. However, in recent decades English law has adopted a public-private divide that is, at least at face value, similar to its Civil law counterparts. Indeed, the importance of this distinction is gaining momentum in several areas of the law. Unsurprisingly, however, this public-private distinction is highly contested in some quarters. Several English law scholars have advocated resistance to the public-private distinction because they consider it unsuitable for English law;¹ at least it would demand a fundamental restructuring of English law to accommodate a public-private law

* Professor of Administrative Law, Utrecht University. www.uu.nl/rebo/medewerkers/GTJM Jurgens

** Professor of Constitutional and Administrative law, Centre of Law and Governance, VU University Amsterdam. www.rechten.vu.nl/ommeren

This article is a result of our research stay at the School of Law of Queens University Belfast. We would like to thank Gordon Anthony for his critical comments and helpful suggestions; of course all errors are ours. Address for correspondence: Professor Dr Gerdy Jurgens, Faculty of Law, Economics and Governance, Utrecht University, Achter Sint Pieter 200, 3512 HT Utrecht, The Netherlands. Email: gjurgens@uu.nl

¹ C. Harlow, “‘Public’ and ‘Private’ Law: Definition without Distinction” (1980) 43 M.L.R. 241.

distinction.² Others have toned down the relevance of the distinction.³ But there is also support for the public-private law divide.⁴ It is interesting to observe that in continental law discussions are also known to flare up regarding the limits of this fundamental division despite the public-private distinction having a much longer history and fundamental place in the legal system. The borders between public and private law are not always set and neither are they very clear or unchangeable.

A. Thesis and the objective of this article

In this article we will argue that the public-private divide has to be considered as a *multifunctional* and *context-dependant* divide. The public-private divide is multifunctional in the sense that it is used for several judicial purposes. Moreover, the divide is context-dependant because the choice to classify something as public or private depends on its context in the legal system. With this thesis we will stress that the main value of the public-private distinction is that it *facilitates the justification and rationalization of certain choices* in the legal system. For example, the applicability of certain legal procedures, but also the adoption of certain substantive principles or the implementation of certain accountability mechanisms can be justified by the qualification of a dispute as a public law or a private law matter.

Thus we distance ourselves from an approach in which the public-private divide is considered to be a dichotomy; a divide in which the labels “public” and “private” are exclusive or strictly separated. Moreover, we distance ourselves from the conception that the public-private law divide is universal or in a sense “given from above”. In such an approach or conception – which, it should be stated from the outset, is rejected by us – the observation that the public-private law divide is not unambiguous may easily lead to the conclusion that the divide is not workable and that the relevance of the distinction is limited.

B. Three lines of argumentation

Briefly, this article follows three lines of argumentation. Our main thesis, further elaborated in part II, is that the public-private divide has

² J.W.F. Allison, *A Continental Distinction in the Common Law: a Historical and Comparative Perspective in English Public Law*, revised edn. (Oxford 2000).

³ D. Oliver, *Common Values and the Public-Private Divide* (London 1999) and recently: “What, if Any, Public-Private Divides Exist in English Law?” in M. Ruffert (ed.), *The Public-Private Divide: Potential for Transformation?* (London 2009), 1 ff.

⁴ P. Cane, “Accountability and the Public/Private Distinction”, in N. Bamforth, P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003), 247 ff.; M. Freedland, “The Evolving Approach to the Public/Private Distinction in English Law” in M. Freedland and J.-B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale?* (Oxford & Portland Oregon 2006), 93 ff.

to be considered as a multifunctional and context-dependant divide. With this thesis we enter into a discussion with John Allison, who presents the public-private divide as the supreme distinction in continental legal systems, moreover leading to a watershed between public and private law. We will demonstrate our thesis by comparing English law and Dutch law. Thus we attain our second line of argumentation: setting the Dutch legal system alongside the five features of John Allison's model for a satisfactory and workable public-private distinction as drawn up in his well-known study *A Continental Distinction in the Common Law*.⁵ Dutch law is interesting as a comparator for UK law because it contains an extensive body of administrative law and has a highly stratified division of public law and private law, which really characterises the Dutch legal system as a continental system; but at the same time it does not meet, in all respects, the features of John Allison's model. However, the public-private divide is deeply rooted in Dutch law and is considered to be very workable by legal professionals. We think that this can be explained by understanding the public-private divide as a multifunctional and context-dependant division.

Our third line of argumentation is on a more concrete level, shifting to a comparison of positive law. Apart from the fact that it is interesting to see the similarities and the differences between the two legal systems as to the qualifications "public" or "private", the comparison also serves our thesis about the multifunctional and context-dependant character of the public-private divide. In order to demonstrate this character, it is necessary to describe at least two areas in which the divide is relevant. We have chosen an area of procedural law and an area of substantive law. In part III we will pay attention to judicial protection. In part IV the applicability of public and private law standards will be discussed. The distinction might of course also be relevant for other purposes, particularly for political and democratic accountability. The various purposes we have chosen demonstrate, at the very outset, the multifunctional character of the public-private distinction. However, full consideration of all purposes for which the public-private divide is used falls outside the scope of this article.

In parts III and IV we will start with a rather comprehensive description of the Dutch legal system in order to make the working of the public-private law divide understandable for readers who are not familiar with Dutch law. After that, it is possible to make a comparison with English law. Beforehand, it is interesting to note that discussions as to where the distinction between public law and private law should be drawn in English law as well as in Dutch law relate to the transfer of power to private bodies. However, the choices as to where to draw the

⁵ Allison, *A Continental Distinction in the Common Law*.

line between public and private law differ in both legal systems: for instance, one remarkable point is that English law uses the label “public law” in classes of cases which would be considered inconceivable under Dutch law. These differences might be explained by the characterization of the public-private divide as one which is multi-functional and context-dependant.

II. THE PUBLIC-PRIVATE DIVIDE AS A MULTIFUNCTIONAL AND CONTEXT-DEPENDANT DISTINCTION

A. Allison's Model Applied to Dutch Law

In his erudite historical and comparative study, John Allison offers a very interesting model to explore the public-private divide. According to Allison, a society with a satisfactory public-private distinction should have the following characteristics:

- a prevailing and well-developed theory of the state, which appreciates the distinctness of the state administration and ascribes to it certain qualities which can be used to justify special legal consequences;
- a categorical approach to law, meaning that the law is approached with a sense of system and of the whole of law, particularly referring to an ordering of law in divisions and subdivisions according to clear criteria;
- a separation of powers between the judiciary and the administration which ensures that the courts entrusted with administrative disputes have both independence and expertise;
- an inquisitorial or investigative judicial procedure to resolve disputes involving the administration.⁶

Allison argues that the absence of any of these features would seriously reduce the workability of the public-private distinction.⁷ The model is of an ideal typical character following the “Weberian” method. Allison emphasises that the generalizations in his model are more explanatory than conclusive and they invite supplementary and corrective research.⁸ His findings are based on the study of two legal systems, the English and the French: “An analysis of the distinction between public and private law in some other context, perhaps the Dutch or the German, might accentuate features other than those in the model setting.”⁹

⁶ Allison, *A Continental Distinction in the Common Law*, pp. 34–39.

⁷ *Ibid.*, p. 36. Although it is tempting to do so, it is not our purpose to discuss the model's features. We are only using this model as a tool of analysis, since it is well known and rather influential in English legal doctrine.

⁸ *Ibid.*, p. 235.

⁹ *Ibid.*, p. 40.

Allison states: “Their general relevance would be reduced by clear indications of successful distinction in other contexts (...) if those contexts lack the features described in my model.”¹⁰ Here we will pick up the gauntlet.

First, as to the conception of the State, different theories of the State and its functions have been developed in the Netherlands.¹¹ These theories, however, are conceived as being rather separate from legal theory: the Dutch legal profession has generally been insulated from political theory.¹² It is disputed to what extent political theories found their way into the organisation of the State, although certainly in the 1900s liberal theories were rather influential.¹³ (We mention this since the public-private divide is indeed commonly associated with liberal political theory.)¹⁴ Broadly speaking, the government – or, more accurately, the State – is conceived as being legally distinct from private individuals and as therefore suited to the application of different legal rules, procedures and institutions. But, although there is a certain vague notion as to the tasks of government, in Dutch law the government is not regarded as being consistently identifiable through the elaboration of institutional and functional distinguishing criteria, as required in Allison’s model.¹⁵ As will be demonstrated hereafter, it is uncertain which functions are to be characterised as governmental or public and which are not. The substance of the public function is considered to be contingent.¹⁶ The choice to designate certain functions as governmental is usually laid down in – from a juridical-analytical point of view: rather arbitrary – political decisions. An outstanding example is that for a long time preserving and promoting “The True Religion” was pre-eminently considered a governmental function;¹⁷ today it is absolutely not. Maintaining and operating prisons is today considered an outstanding example of a governmental function in the Netherlands, yet this should not necessarily remain so.¹⁸ Dutch legal and political theory has quite some difficulty in deciding on even the core functions of the State.

¹⁰ Op.cit., p. 235.

¹¹ See Van der Pot, *Handboek van het Nederlandse Staatsrecht*, 15th edn. (Deventer 2006), 3 ff.

¹² This is considered to be roughly the same in the UK. See Allison, *A Continental Distinction in the Common Law*, p. 74.

¹³ In particular concerning the statesman Johan Rudolph Thorbecke. See E. Poortinga, *De scheiding van publiek- en privaatrecht bij Johan Rudolph Thorbecke (1798–1872)* (Nijmegen 1987).

¹⁴ See e.g. P. Cane, “Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept” in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence* (Third Series) (Oxford 1987), 57.

¹⁵ Allison, *A Continental Distinction in the Common Law*, p. 34.

¹⁶ B.P. Vermeulen, “De publieke taak: een veel-zijdig begrip”, in J.W. Sap, B.P. Vermeulen and C.M. Zoethout (eds.), *De publieke taak* (Deventer 2003), pp. 20 ff.

¹⁷ See for instance Lisa Jardine, *Going Dutch: How England Plundered Holland’s Glory* (London 2008).

¹⁸ See in a multinational context: J. Braithwaite, *Regulatory Capitalism. How it Works, Ideas for Making it Work Better* (Cheltenham and Northampton 2008), 21.

As to the second feature: indeed the Netherlands has a rather categorical approach to law.¹⁹ There is, for example, an extensive body of statutory administrative law which is very distinct from private law. Curiously, however, the law on governmental contracts and public authority liability is historically rooted in private law. There is no counterpart for private contract law in the field of public law. Likewise, the law on public authority liability *as part of the rules of public law* is only at an embryonic stage.²⁰ Furthermore, the division between public and private law is not exclusive: the applicability of public law does not in itself exclude the applicability of private law standards at the same time. Neither can cases simply be qualified as either public or private. Usually this qualification depends upon the question which needs to be answered in respect of the specific case and its context; and complex cases give rise to both public law and private law questions. Moreover, the criteria used for these kinds of qualifications are not entirely certain and clear.

As regards the independence and expertise of the courts entrusted with administrative disputes – the third feature – the Netherlands has a separate branch of jurisdiction in administrative law cases. However, the administrative courts in the first instance form a part of the ordinary District Courts.²¹ District Court judges subsequently participate in the different sectors (administrative law, private law and family law, criminal law). Therefore, at this point the Dutch system is largely similar to the judicial system in England and Wales. As to the courts of second instance which hear administrative law cases (which at the same time are – with the exception of tax law – the courts of last resort) the situation is more complex in the Netherlands: the Administrative Law Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) has a rather general jurisdiction in administrative law cases; tax assessments are dealt with by the Court of Appeal (*Gerechtshof*) and by the Supreme Court (*Hoge Raad*) (both are the ordinary courts of appeal in civil and criminal cases) and there are two specialised courts, one for social security and civil service cases²²)

¹⁹ Christof R.A. Swaak, "Public Law in the Netherlands" (1995) 1 E.P.L. 43.

²⁰ A proposal to extend the General Administrative Law Act (GALA) with provisions on public authority liability has been recently sent to Parliament, *Kamerstukken II*, 2010/2011 (Parliamentary Documents, Second Chamber), 32 621, no. 1–4. Aanvulling van de Algemene wet bestuursrecht met bepalingen over nadeelcompensatie en schadevergoeding bij onrechtmatige overheidsdaad (Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten).

²¹ A.F.M. Brenninkmeijer, "Chapter 3 Judicial Organization", in J.M.J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch Law* (Alphen aan den Rijn 2006), at pp. 54–55 and 61. See for a description of the historical development towards the current court system: R.J.G.H. Seerden & F.A.M. Stroink, "Administrative Law in the Netherlands", in: R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis* (Antwerp & Oxford 2007), 184 ff.

²² In Dutch: de Centrale Raad van Beroep. The translation used on the official website of the Dutch judiciary (www.rechtspraak.nl)

is: “the Central Appeals Tribunal”. However, it should be noted that it is not comparable to the tribunals known in the English legal system; therefore we prefer the designation “court”. and one for social-economic administrative law cases.²³ In sum: the courts entrusted with administrative disputes are considered to be independent from the administrative authorities. However, District Court judges are not particularly specialised in administrative law; the judges in the separate administrative courts dealing with appeal cases are, however.

When it comes to the fourth feature, the characterization of judicial procedure, we can observe that although the Dutch administrative courts traditionally take a slightly more investigative attitude than the civil courts, the Dutch administrative courts do not follow an inquisitorial procedure (the assessment is limited to the grounds and facts submitted by the claimant and the courts are very reluctant to use their investigating powers).²⁴ Civil courts, which because of their residual competence also hear cases against governmental authorities, are bound to follow a strict adversarial procedure. However, it should be noted that a procedural aspect constituted the demand for the existence of an administrative court: proceedings before the administrative courts are less expensive and the courts are more approachable etc.

B. A Multifunctional and Context-Dependant Distinction

In the previous section we have demonstrated that the Dutch legal system does not meet, in all respects, the features of Allison’s model. Nevertheless, the public-private law divide has proven to be very workable for Dutch law; the public-private division is a well-worn, deeply-rooted division. At the same time we can observe that the public-private law divide does not lead to a watershed between public and private in Dutch law. Yet our statement concerning its workability is motivated by the multifunctional and context-dependant approach of the divide, which we consider to be the most productive approach. The public-private divide does not have to result in a solid dichotomy; neither does the qualification “public” or “private” have to be undisputed. As said, the main value of the public-private law divide is that it facilitates the justification and rationalization of certain legal choices in the legal system.

In a reply to Peter Cane, Allison designates the public-private law divide as “the *summa divisio* or supreme distinction of Continental legal

²³ In Dutch: het College van Beroep voor het Bedrijfsleven, “officially” translated as “the Trade and Industry Appeals Tribunal”. See the previous footnote for a comment on this designation.

²⁴ A.J.C. de Moor-van Vugt and B.W.N. de Waard, “Chapter 17 Administrative Law” in J.M.J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch Law* (Alphen aan den Rijn 2006), 364 ff.

thought”.²⁵ Indeed, there is no doubt that in a continental legal system like the Dutch the distinction between public and private law is in this sense the supreme distinction. The division manifests itself in the Netherlands not only in judicial protection against governmental action and in the nature of the applicable substantive law, but also in many other spheres of law to which we shall not or only obliquely pay attention. The entire Dutch legal culture is imbued with this distinction, although it is not the sole classifying mechanism. Not only can different kinds of legal relationships be questioned regarding whether they are of a public or private nature, but also areas of regulation, legal rules, judges and lawyers. The division is also very important in legal education.

The supreme nature of the distinction does not impede its context-dependant character. Referring to different countries as different contexts this is also recognised by Allison.²⁶ However, we assert that the supreme nature of the distinction does not interfere with its multifunctional character. On the contrary, *because* it is the supreme distinction it is used for multiple purposes and various criteria are used for drawing the distinction. It is for this reason that we call the distinction between public and private law a multifunctional and context-dependant distinction.

Cane and Freedland largely concur with our view. Cane argues quite extensively that the public-private divide has a normative dimension: “The public/private distinction can be understood as part of a normative theory of accountability under which the exercise of public functions should be subject to a particular accountability regime (...).”²⁷ In his view the distinction does not only have a juridical normative character but is ultimately a political one.²⁸ From a Dutch point of view there is no doubt that this is observed very prudently. For a continental jurist who is focused on positive law, on the surface the descriptive dimension of the public-private divide is the most obvious one: in most day-to-day cases it is possible to determine without difficulty which elements of a case are of a public or a private nature and what the legal consequences of this public or private nature are (access to the courts, substantive law etc.) Thus, not every case is difficult to qualify. However, like in every continental system, the distinction is also used in a normative and even a political sense: it is definitely a political choice whether health care is a matter of public law or private law regulation and what quality (public or private) the regulator should have. Cane argues that the public-private divide should be regarded as a

²⁵ J.W.F. Allison, “Variations of view on English legal distinctions between public and private” [2007] C.L.J. 702.

²⁶ Allison, *A Continental Distinction in the Common Law*, pp. 40, 235, and Allison, “Variations of view”, p. 703.

²⁷ Cane, “Accountability and the Public/Private Distinction”, p. 271.

²⁸ P. Cane, *Administrative Law* (Oxford, 4th ed., 2004), 17.

value-based distinction.²⁹ As will be demonstrated in the following sections this is surely correct, at least in the Netherlands. From this perspective we fully understand why Cane rejects the radical instrumentalist position of an empirically-oriented regulation scholar like Scott;³⁰ it is not only effectiveness that counts. Moreover: “effectiveness and success can only be judged in the light of normative theory about the way power ought to be distributed.”³¹ The next question in this approach, of course, is how this value-based public-private distinction should be drawn. In an earlier article Cane already called the public-private law divide a “multifaceted” distinction.³² For this Cane has more recently sought the answer in the idea of “polycontextuality”,³³ which he borrows from Gunther Teubner.³⁴ With this concept he tends to lean towards a distinction that we regard as multifunctional and context-dependant.

Mark Freedland is also inclined to think in terms of such a distinction.³⁵ He adheres to a normative approach defending the public-private divide essentially in order to defend public law. Likewise in his approach the distinction is not an absolute one, but is essentially multi-dimensional, although he elaborates this multi-dimensional character in a slightly different way than we do. Furthermore, it is very interesting to note that Freedland explicitly acknowledges that public law is to be regarded as intersecting, in very important ways, with private law (and also with areas of regulation by law which are not very strongly or clearly identified as being between public and private law). We will see below a particular example of this so-called intersecting effect in the context of Dutch general principles of proper administration and human rights which also apply when private law instruments are used by public authorities.

²⁹ “Accountability and the Public/Private Distinction”, p. 275.

³⁰ *Ibid.*, p. 271. Cane refers to C. Scott, “Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance” (2002) 29 *Journal of Law and Society* 56 and C. Scott, “Accountability in the Regulatory State” (2000) 27 *Journal of Law and Society* 38, 42. Interesting for this approach is also C. Scott, “Spontaneous Accountability”, in M.W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge 2006), 174 ff and C. Scott, “Self-Regulation and the Meta-Regulatory State”, in F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn 2006), 131 ff.

³¹ *Ibid.*, p. 275.

³² Cane, “Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept”, p. 78.

³³ Polycontextuality has become one of the central elements of autopoietic social and legal theory. The autopoiesis of Gunther Teubner, which is based on the system theory of especially Luhmann, did receive substantial attention in Dutch legal doctrine at the beginning of the 1990s, partly because of the influence of the then Minister of Justice, Hirsch Ballin, who was originally a constitutional and administrative legal scholar.

³⁴ Cane argues that Teubner does not reject the public-private distinction (“Accountability and the Public/Private Distinction”, p. 273). However, like Allison (“Variations of view”, p. 701) we suppose that this interpretation of the, albeit very abstract, article by Teubner is not fully correct: the idea of polycontextuality is in the eyes of Teubner – who tries to transcend the distinction – an *alternative* to the public-private law divide, see G. Teubner, “After Privatization? The Many Autonomies of Private Law” (1998) 51 *Current Legal Problems* 395, 396 and 407.

³⁵ Freedland, “The Evolving Approach to the Public/Private Distinction in English Law”, pp. 107 ff.

Hereafter, we will describe the working of the public-private law divide in Dutch law in the area of judicial protection (part III) and the applicability of certain standards of substantive law (part IV). This analysis of Dutch law and the comparison with English law supports the approach which is taken by Cane and Freedland and could serve as a tool to elaborate their position in more depth.

III. THE PUBLIC-PRIVATE DIVIDE IN THE FIELD OF JUDICIAL PROTECTION

A. Some general Remarks on Judicial Protection in Dutch Law from a Comparative Perspective

The public-private divide is important in both English and Dutch law for choosing the right “route” in judicial protection; in other words: this is one of the – multiple – functions of the public-private law divide. In this section we will describe the Dutch system of judicial protection in the perspective of the public-private divide and compare it with the English system in this respect. At the end of this section we will argue that differences in the use of the qualifications “public” and “private” might very well be explained by the purpose for which the distinction is used here and by the context of the legal system in question.

It goes without saying that the public-private law divide is important in English law as to the amenability to judicial review. In the famous *O'Reilly* case³⁶ the House of Lords ruled that – besides some exceptions which should subsequently be decided on a case-by-case basis – the procedure for judicial review should be exclusive to public law cases. Because of this decision it became necessary to qualify cases as public law or private law in order to know which kind of proceedings should be commenced. Although the strict nature of the rule from the *O'Reilly* case has been greatly mitigated over the years, it is important to realize that it really opened the door to considering the judging of public law cases as a specific branch of jurisdiction. Moreover, the Queens Bench Division of the High Court in England and Wales, which is entrusted with the task of judicial review, is nowadays called “the Administrative Court”.

In Dutch law, the judging of public law cases is also a specific branch of jurisdiction. Unlike English law, Dutch law does not have a two-tier system of statutory appeal and judicial review. Judicial protection by the administrative courts is only provided on a statutory basis. Nowadays (that is: from 1994 onwards) this statutory basis can be found in the General Administrative Law Act (hereafter: GALA;

³⁶ *O'Reilly v Mackman* [1983] 2 A.C. 237.

Algemene wet bestuursrecht).³⁷ An appeal to the administrative court is restricted to a point of law; therefore these statutory appeals are – in the same way as is the case for statutory appeals on a point of law in English law³⁸ – comparable to judicial review.

The GALA makes general provision for an appeal against – what we will here translate as – “decisions” (*besluiten*). These *decisions* are pre-eminently considered as public law actions. In general terms, the appeal has to be lodged before the administrative section of the district court. Whenever an act of a public body does not consist of a *decision* which is susceptible to appeal, it is possible to address the district court in a civil procedure (it is also common in those circumstances to refer to the court as “the civil court”). Therefore the competence of the civil courts is described as “residual”.³⁹ The importance of the residual competence of the civil courts should not be underestimated: the civil courts can be addressed whenever there is no competence for the administrative courts. This is rooted in the *Guldenmond/Noordwijkerhout* case,⁴⁰ decided in 1915, which introduced private law remedies in cases concerning governmental actions. The legal basis for these remedies is often to be found in the doctrine of “wrongful acts”. Although the provisions concerning “wrongful acts” can be found in the Civil Code, they also apply to public law bodies⁴¹ and thus provide the basis for a claim against public bodies outside the scope of administrative law.

Not all decisions from public authorities are open to appeal. An important exception are decisions containing primary or secondary legislation or general policy rules. Nevertheless, because of the so-called residual competence of the district courts in civil proceedings, it is possible to address the civil courts in these matters.

All in all, the Dutch system of judicial protection could be described as a system in which the law of the spirit-level applies: the more the competence of the administrative courts is broadened, the less will be covered by the residual competence of the civil courts and *vice versa*. This is, of course, very different from English law where recourse to civil (or private law) proceedings depends on the existence of a contractual or a tortious relationship. Hereafter, in section III D, we will contend that this dissimilarity might be an important explanation for

³⁷ An English version of the General Administrative Law Act can be found on the website of the Dutch Government (www.rijksoverheid.nl) at <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2009/10/01/general-administrative-law-act-text-per-1-october-2009.html>.

³⁸ See *E v Secretary of State for the Home Department* [2004] Q.B. 1044.

³⁹ In English law judicial review is referred to as “residual” or “a remedy in last resort”. This qualification expresses the precedence of other public law remedies (statutory appeals) to judicial review. However, it does not define the position of judicial review with respect to the ordinary procedure. In Dutch law the qualification “residual” is used to express the precedence of the route for judicial protection by the administrative courts to the civil proceedings.

⁴⁰ HR 31 December 1915, (1916) NJ 416. [HR is the abbreviation for Hoge Raad (Supreme Court). NJ (Nederlandse Jurisprudentie) are Dutch Law Reports.]

⁴¹ See HR 20 November 1924, (1925) NJ 89 (*Ostermann I*).

the differences between Dutch law and English law as to the use of the labels “public” and “private” for the purpose of amenability to judicial review.

B. A closer Look at Access to Dutch Administrative Courts

An analysis of the definition of “decision” in the GALA reveals how the jurisdiction of the administrative courts is determined. A “decision” is defined as “a written decision of an administrative authority constituting a public-law juridical act”.⁴² Only *juridical* acts with a *public law character* can be considered as “decisions”.⁴³ Before focusing more precisely on the characteristics of decisions, it is important to know that Dutch law distinguishes explicitly – more than English law does in the context of judicial review – the qualification of the *body* from the qualification of its – administrative – *acts*. The main rule for determining if an individual is dealing with a “decision” is that the authority is invested with a specific statutory power to make legally binding decisions, the essential part of a decision being that it is – by the unilateral decision of the competent authority – legally binding on those to whom it is addressed. Lacking a specific statutory power, the authority’s act is either a mere factual action or a *private law act*. In this connection it is important to note that all public bodies are presumed to have the ability to act in private law as legal persons possessing legal personality.⁴⁴ Consequently, they can enter into contracts or use their power resulting from the ownership of land and waterways without disposing of a specific statutory basis in this respect. Indeed, the general ability to use this private law power does not imply that public bodies can use private law instruments as they please.⁴⁵ However, private law instruments can play an important role in realizing the public goals taken up by the government. As regards our subject, these private law acts are, just like factual acts, not amenable to appeal but they can be challenged in a civil procedure.

Although the main rule in the Dutch doctrine is that a decision can only be based upon a specific statutory power, this is not the whole story. In past decades the Dutch administrative courts have found ways of reasoning to accept the existence of decisions without a specific

⁴² GALA, s. 1:3(1).

⁴³ See on the different kinds of decisions: De Moor-van Vugt and De Waard, “Chapter 17 Administrative Law”, note 24 above, pp. 345 ff.

⁴⁴ De Moor-van Vugt and De Waard, “Chapter 17 Administrative Law”, note 24 above, pp. 349 and Seerden & Stroink, “Administrative Law in the Netherlands”, note 21 above, p. 172–175.

⁴⁵ On the contrary: there is also an important track of case law as to the question whether the use of private law instruments by public bodies is permitted, concerning the fact that the authorities also have public law instruments for the same or similar purposes. This is referred to as the “two-way doctrine” (*twee-wegenleer*). The landmark case on this subject is the Windmill case, HR 26 January 1990, *Ned. Jur.* (1990) 393. See N. Verheij, “From Private Law to Public Law” (2000) 12 European Review of Public Law 495.

statutory basis. The purpose of this reasoning is clear: this opens the door to the administrative courts. This approach is referred to as a “strategic” approach (in contrast to the “dogmatic” approach).⁴⁶ But there is more to this than just strategy: in particular, the case law concerning the “public function” can be seen as a demonstration of the changing dogma into a more *functional approach to public law*. It is not the status of the authority or the source of the power that determines the qualification of an act as public, but its substance.

The case law concerning the “public function” is an important example of the approach whereby the scope of judicial protection by the administrative courts is broadened. The main question considered by the courts in those cases is whether the authority exercises a public function. We find this approach in two types of cases which we – for the purpose of this article – would categorise as follows:

1. The public function test and “classical” administrative authorities

The first category of cases concerns actions by a classical administrative authority⁴⁷ (for example: the Crown, the Minister, the Mayor, the Municipal Executive (the Mayor and the Aldermen)) that lack a specific statutory basis; in these cases the problem is the qualification of these *acts*. An example of this can be found in the *Long Lin* case.⁴⁸ Here, the Dutch Minister of Transport, Public Works and Water Management prohibited a seriously damaged ship (called the *Long Lin*) from entering Dutch territorial waters because he feared that the waters would become polluted. He had asked the Chinese owners of the ship to guarantee payment for the potential costs of clearing the waters, but they had refused to do so. The Minister did not possess any specific statutory power to deny access to territorial waters. Therefore, it was to be expected that the administrative court would have determined that the denial would have been based on the position of the State as the owner of the waters, which would qualify the denial as a *private law act* to be challenged in a civil procedure. But the court ruled that the Minister, in denying access, was performing a public function: namely, he was ensuring the quality of Dutch territorial waters. Consequently, the denial was qualified as a decision which was susceptible to appeal; an *act of public law*. This approach, though considered to be of fundamental importance, is used only in a limited amount of cases.⁴⁹

⁴⁶ Van Wijk/Konijnenbelt & Van Male, *Hoofdstukken van bestuursrecht* (The Hague, 14th ed. 2008), p. 193.

⁴⁷ In the definition in GALA, s. 1:1(1)(a): an organ of a juristic person governed by public law.

⁴⁸ ABRvS 10 April 1995, (1995) AB 498. [ABRvS is the abbreviation for Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State). AB means Administratiefrechtelijke beslissingen (Dutch Administrative Law Reports).]

⁴⁹ Another example is the case of the Groningen Water Supply System, in which the Groningen municipal authorities prohibited the waterworks from laying underground pipes in municipal

It would be a misunderstanding to think that all kinds of private law acts by public bodies which have something to do with a public interest are qualified as public law acts with this kind of reasoning. Therefore, unlike the approach of the administrative courts described here, the civil courts can still be addressed in most cases concerning actions by public bodies which lack a specific statutory basis in public law.

2. *The public function test and “non-classical” administrative authorities*

The second type of cases where the public function test is used are cases concerning private organisations not acting on a statutory basis. Essentially, in these cases there are two hurdles to be cleared in order to conclude that their actions are decisions which are susceptible to appeal or – in other words – acts of public law: the *organisation* should be qualified as an administrative authority and the (non-statutory) *act* should be qualified as a decision. While using the public function test, the courts have focused on the qualification of the organisations in these types of cases. In addition to “classical administrative authorities” under GALA an administrative authority can also be “any other person or body vested with public authority”.^{50,51} “Being vested with public authority” is generally interpreted as possessing the statutory power to take decisions.⁵² Lacking any statutory basis, a private organisation would not be considered to have such a power and therefore would not be qualified as an administrative authority. However, in the type of cases considered here, the courts have decided otherwise. The subject-matter of the case law mainly concerns private organisations providing financial support (e.g. subsidies) to citizens. According to Dutch case law, these kinds of private organisations are qualified as administrative authorities if (a) the subsidies are mainly publicly funded and (b) a “classical” administrative authority has determined or approved the criteria for providing the subsidies. In essence, the courts regard the private organisations as a kind of “extended arm” (*verlengde arm*) of the “classical” administrative authorities. Thus, the foundation which was established to look after the interests of former coal miners who suffered from silicosis (*Stichting Silicose Oud Mijnwerkers*) – a private body – was held to be an administrative authority when allowing or declining compensation to former miners, since funding for this compensation was provided by

land, ARRvS 1 December 1977, *AB* (1978) 208 or a case concerning the municipal authority” refusal to pay for a private company’s relocation costs, ABRvS 11 May 1998, (1998) *AB* 298.

⁵⁰ GALA, s. 1:1 (1) (b).

⁵¹ These “other administrative authorities” are often – but not always – of a *hybrid* character. However, this category should not be identified as wholly equivalent to the hybrid authorities of the HRA in English law.

⁵² Thus, the Examination Board of a private school granting official certificates is vested with public authority. See ABRvS 17 July 2000, (2000) *AB* 446.

the State and the State Secretary for Social Affairs and Employment had approved the criteria formulated by the Foundation, the State funding being only provided in cases meeting the criteria.⁵³

C. Comparison between Dutch and English Law as to the Amenability to Review before the Administrative Courts

Having sketched the outlines of the Dutch legal system, we can now compare Dutch law with English law as to the amenability to review before the administrative courts. Looking at English case law several tests can be found for deciding whether a case should be qualified as a public law case and therefore should be amenable to judicial review.⁵⁴ The most important test is to consider the source of power:⁵⁵ cases concerning the use of statutory powers usually qualify for judicial review. On the other hand, cases based on a private law relationship – for the most part: contracts – are generally excluded from judicial review. At first sight this seems similar to Dutch law. However, the Dutch statute test differs from the English one in that it demands an *express* and *specific* statutory power to take the decision in question.⁵⁶ In the English law system the focus of statutory provisions conferring powers on public authorities seems to be more about the *function* of these powers than the *specific instruments* which can be used by the authorities. Moreover, for the purpose of amenability to judicial review, English law does not dichotomise juridical acts and factual acts:⁵⁷ unlike Dutch law both are amenable to review. The same seems to hold true for decisions concerning property,⁵⁸ in Dutch law those decisions will normally be classified as private law acts, which cannot be challenged before an administrative court. Some exceptions exist, as mentioned earlier in the *Long Lin* case. A public function test, developed by the Dutch courts, sometimes brings these cases within the reach of judicial review. In English law these cases will generally be covered by the statute test. Thus, apparently departing from the same basic principle – statutory power – the scope of judicial review is broader in

⁵³ ABRvS 30 November 1995, (1996) AB 136. Another example can be found in the case concerning the “Relief Fund for the Victims of the Bijlmer Aircraft Disaster Foundation” (*Stichting Hulpfonds Gedupeerden Bijlmerramp*), ABRvS 27 August 2003, (2004) AB 10.

⁵⁴ See for an overview of these tests: H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review*, 6th edn. (London 2007), 124 ff.

⁵⁵ For the purpose of the comparison it is not worthwhile considering the prerogative powers.

⁵⁶ F.J. van Ommeren and G.A. van der Veen, *Het Awb-besluit* (Nijmegen 1999), 43 ff.

⁵⁷ *Ibid.*, pp. 122–123

⁵⁸ It should be noted that in English law decisions concerning governmental property taken by local authorities or by other statutory bodies need a statutory basis, see *R. v Somerset County Council ex p. Fewings* [1995] 1 W.L.R. 1037. This does not apply to central government; in this respect these authorities are considered to have powers which they have in common with every individual. This is referred to as the “third source of power”. See B.V. Harris, “The “third source” of authority for government action revisited” (2007) 123 L.Q.R. 226–250.

English law than in Dutch law, because the question whether a statute provides for a public law power is answered in a different way.

The second test in English law is the so-called public function test. This test is to be considered as complementary to the statute test.⁵⁹ It seeks to determine whether a body, lacking any formal statutory power, is nevertheless exercising a public function.⁶⁰ The public function test is seen as the courts' legal response to privatization, contracting out, self-regulation etc., which have led to the performance of all kinds of activities by private bodies in what used to be the public domain. Case law shows that the courts use several tests to determine whether such a private body exercises a public function and will thus be amenable to judicial review. The most important case on this matter remains *Datafin*,⁶¹ which gave rise to a line of related case law on how the "public function" test can be satisfied. De Smith's notes the "but for" test, the statutory underpinning test, the fact that a body is exercising extensive or monopolistic powers, the absence of consensual submission, and the public funding test – the last one being "of only marginal relevance".⁶²

One can find some similarities between the public function test in Dutch and English law. If we compare the various aspects in English case law to Dutch case law, we recognize in the Dutch case law mentioned above (especially the case concerning the former coal miners suffering from silicosis) the public funding test. Just like in English law, public funding is not in itself sufficient to justify the qualification "public"; otherwise many subsidised organisations would only therefore be qualified as public. The other important aspects in this case – the determination or approval of the criteria for conferring compensation – which transformed the private body into an "extended arm" of the State, bears some resemblance to the "but for" test (in the sense that but for the performance of the private body, the government would have provided the compensation itself) or the aspect of statutory underpinning (the government has woven the body into the fabric of public regulation by explicitly making the public funding dependent on its approval of the criteria). In defining these aspects a link to mere governmental action is sought. It is important to note that the Dutch case law mentioned here actually represents the only examples in which

⁵⁹ Although rule 54(1) CPR, in which the public function test is established, suggests that the public function test is the overall test for amenability to judicial review. See also C.D. Campbell, "The nature of power as public in English judicial review" [2009] C.L.J. 90 who speculates about the non-complementary status of the public function test. Oliver however alerts us to not taking the text of CPR Pt 54 too literally, because it is "shorthand for quite complex case law". See D. Oliver, "Functions of a public nature under the Human Rights Act" (2004) P.L. 346, 347.

⁶⁰ According to Woolf, Jowell & Le Sueur, *De Smith's Judicial Review*, pp. 124–125 the public function test is also used for qualifying statutory acts based on Private Acts of Parliament.

⁶¹ *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] Q.B. 815.

⁶² See op.cit., pp. 133–137.

the non-statutory actions of private bodies are qualified as decisions amenable to review. Dutch law does not attach great importance to such an aspect as the existence of extensive monopolistic powers, which appeared to be very important in the context of the *Datafin* case.⁶³ Therefore, as to the non-statutory actions of private organisations, a broader category of cases come within the reach of judicial review in English law than is the case in Dutch law. In Dutch law this category is mainly restricted to private organisations providing subsidies or other kinds of financial contributions. A case which is comparable with the *Datafin* case would never fall within the jurisdiction of an administrative court in the Netherlands.

D. Possible Explanations for the Differences between English Law and Dutch Law

Although “administrative law” or “public law” was previously regarded as something of an alien concept in English law (largely as a result of the influence of Dicey), we now find that the label “public law” is used in cases where the Dutch continental tradition would never consider using it. It is interesting to look for an explanation for this different approach.

The first explanation might be found in the existence of judicial protection outside the scope of judicial review: in this respect English law differs immensely from Dutch law. In his speech in *Datafin* Sir John Donaldson M.R. stated: “The principal issue in this appeal, and the only issue which may matter in the longer term, is whether this remarkable body is above the law.” If the Take-Over Panel had not been amenable to judicial review, *Datafin* could not achieve effective judicial protection elsewhere, for example by obtaining a remedy in the ordinary procedure, the reason for this being that the competence of the civil courts depends on the existence of a contractual or a tortious relationship which did not exist in this case. As seen above, Dutch law has the “fall-back” option of the residual competence of the civil courts: whenever there appears to be no possibility to address the administrative courts because the action of the administrative authority is not held to be characterised as a decision, the civil courts can be addressed. Therefore, the absence of jurisdiction for the administrative courts will only result in the claimant having to resort to the civil courts but it will not result in him or her being left without any remedy.

⁶³ Colin D. Campbell has critically examined the “but for” test and the “statutory underpinning” test (“The nature of power as public in English judicial review”, pp. 90–117) and has even promoted a monopoly test as the sole test – also replacing the source of power test – for determining the availability of judicial review (C. D. Campbell, “Monopoly power as public power for the purposes of judicial review” (2009) 125 L.Q.R. 491–521).

A second explanation is closely related to the subject-matter of the next section and will therefore only be briefly addressed here. In English law the amenability to judicial review is much more important for the applicability of public law standards than in Dutch law regarding amenability to appeal. The Dutch civil courts will apply these public law standards to all kinds of activities of classical⁶⁴ administrative authorities which fall outside the scope of appeal. Therefore, it is not necessary to create a broad jurisdiction for the administrative courts in order to achieve the applicability of public law standards. Thus the administrative procedure is primarily confined to those classes of cases in which the specific characteristics of this procedure are mainly held to be important: cases concerning the unilateral decisions of administrative authorities ("decisions").

This latest point also relates to a more fundamental issue: what is the actual purpose of the existence of a separate jurisdiction of the administrative courts? Answering this question comprehensively would go far beyond the reach of this article, but we can touch upon some essential differences of perspectives which can also serve as an explanation for the different approach of the public-private divide in the context of judicial review.

From a Dutch perspective, two purposes of the judicial review of administrative actions can be broadly distinguished. First, judicial review could enhance the quality of administrative decision-making (thus a review serves the promotion of "good administration"). Secondly, the function of judicial review could be to guard the rights of the individual against the abuse of official power. After a decades-long debate, the Dutch legislator cut the knot: judicial review by the administrative courts is supposed to serve as the protection of citizens, not the improvement of governmental quality (although, of course, this can be seen as a by-product).⁶⁵ This choice affects the nature of the judicial procedure. Due to the residual competence of the civil courts, the main purpose of the jurisdiction of the administrative courts is not to provide judicial protection *as such*, but has to be found in the special features of the administrative procedure. The competence of the administrative courts serves the aggrieved citizen by providing an informal and less expensive avenue for judicial protection. These features are held to be important in cases in which administrative authorities are able to do things which no one else would be able to do: to determine someone's legal position by a unilateral decision.

⁶⁴ As to the "other administrative authorities" this does not hold true, since they are only administrative authorities in as far as they take decisions in which case the administrative courts will be competent.

⁶⁵ E.J. Daalder, G.R.J. de Groot, J.M.E. van Breugel (eds.), *De parlementaire geschiedenis van de Algemene wet bestuursrecht: Tweede Tranche* (Alphen aan den Rijn 1994), 174. See also De Moor-van Vugt and De Waard, "Chapter 17 Administrative Law", note 24 above, pp. 364 ff.

In English law, the purpose of judicial review was historically unambiguous: the role of the courts was to preserve the boundaries of executive powers which Parliament had drawn while conferring powers on public authorities (the “*ultra vires*” rule).⁶⁶ From this perspective judicial review can be regarded as a kind of accountability mechanism. However, the debate started in 1987 by Dawn Oliver concerning the foundations of judicial review⁶⁷ also appears to have cleared the way for ascribing more purposes to judicial review. In addition to an accountability mechanism, with nowadays a broader perspective than legality in the strict sense of “*intra vires*”, judicial review is now considered to serve as the judicial protection of citizens and promoting the quality of the administration.^{68,69} We mention these developments here because they – and this holds especially true for the perspective of judicial review as a mechanism of judicial accountability in the present-day sense – might explain the broad scope of judicial review in English law compared to Dutch law.

Summarizing our findings: the comparison of English and Dutch law shows that for the purpose of judicial review English law uses the label “public” more generously than Dutch law does. Thus the question of how to divide public law from private law is answered differently in the context of the different legal systems. In our opinion an important explanation for this divergence can be found in the respective legal systems themselves. In other words: the colouration of the public-private divide is context-dependant.

IV. THE PUBLIC-PRIVATE DIVIDE AND SUBSTANTIVE LAW

A. Some general Remarks on Substantive Dutch Law from a Comparative Perspective

The public-private divide has also become important in another context: the applicability of a certain set of rules – public law or private law standards. In English law this is most clearly the case with the Human Rights Act 1998 (hereafter: HRA), but the development of substantive and procedural rules is much broader. The Dutch substantive public

⁶⁶ See for instance, H. Barnett, *Constitutional and Administrative Law*, 6th edn. (Abingdon 2006), 719. However, Craig argues that this historical explanation is incorrect, See P. Craig, “Ultra vires and the foundations of judicial review” [1998] C.L.J. at pp. 79 ff.

⁶⁷ D. Oliver, “Is the ultra vires rule the basis of judicial review?” [1987] P.L. 543. See for the debate between the supporters of the Ultra-vires model and the rights-based approach: C. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford 2000); M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford-Portland 2001).

⁶⁸ Woolf, Jowell & Le Sueur, *De Smith's Judicial Review*, pp. 7, 8.

⁶⁹ Craig, just as many others, nowadays advocates a rights-based approach, see P. Craig, *Administrative Law* (London, 6th ed., 2008), pp. 18 ff. Poole, who strongly criticises this approach, labels it as common law constitutionalism (CLC). See T. Poole, “Back to the Future? Unearthing the Theory of Common Law Constitutionalism” (2003) 23 O.J.L.S. 453; “Questioning Common Law Constitutionalism” (2005) 25 L.S. 142.

law standards comprise in particular the public law standards of the GALA, the so-called “general principles of proper administration” and human rights.

In the context of our thesis it is of course relevant to know how and to what extent the applicability of substantive law depends on the public-private law divide. To prevent any misunderstanding, according to Dutch law the basic principle is *not* that public law standards would only be applicable in public law relationships and private law standards would only apply in private law cases. On the contrary, right from the outset it should be noted that in Dutch law the applicability of public law does not automatically exclude the applicability of private law standards at the same time.

However, in another way the public-private law divide is very relevant for the applicability of substantive law. In Dutch law it is a basic principle – with only one important exception to which we will pay attention later – that public law standards are only applicable to *public authorities*. In order to facilitate the judging of the applicability of public law standards, it is necessary to qualify the person or body who is acting: is it a public authority or not? The question of the public-private law divide here shifts to the question of the legal status of the body whose acts have to meet certain standards.

In English law the applicability of public law standards is also dependent on the legal status of the acting body. Human rights are only applicable to public authorities. Both legal systems are therefore rather similar in this respect.

However, as regards the so-called “horizontal effect” of fundamental or human rights there is a difference between the two systems which will turn out to be rather important. Dutch law is less reluctant to allow a certain horizontal effect to fundamental or human rights.⁷⁰ We will demonstrate that this difference between the legal systems may serve as a possible explanation for the fact that in Dutch law a body is less easily qualified as a public authority.

B. The Dutch general Principles of Proper Administration

The first set of public law standards which are of interest are the general principles of proper administration which guide the exercise of administrative action. These principles are partly codified in the GALA – for example, the principle to state reasons for decisions which are taken, the principle of due care, the principle of proportionality etc.

⁷⁰ Olha Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Utrecht/Munich 2007), 104 ff and Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, The Netherlands, Italy and England* (Austin 2008), 145 and 146.

In dealing with a case the Dutch administrative courts will start by applying administrative law standards. However, in cases – few, though of fundamental importance – in which those standards do not provide for a suitable answer, the administrative courts also resort to private law standards, for example the rules laid down in the Civil Code.⁷¹ Nowadays there is some discussion as to the question whether these private law standards are directly applicable or only in an analogous way.⁷²

Conversely, according to Dutch law, it is important to note that public law standards also apply when the actions of public authorities are to be qualified as *private law acts* (which are not reviewable in the administrative courts, as seen above). Thus the applicability of these public law standards does not have an exclusive character. Whenever a public body uses its position as a landowner or enters into a contract – in Dutch law qualified as private law acts – both private law standards (the Civil Code) and public law standards (the general principles of proper administration) would apply.

In the landmark case of *Amsterdam v Ikon*, the Supreme Court ruled that the general principles of proper administration, and particularly the legal principle of equality, were directly applicable to governmental action based on private law. Later case law shows that this rule applies regardless of what kind of general principle of proper administration is concerned and regardless of what kind of governmental private law act is in question.⁷³ A few years later, this ruling was codified in the Civil Code (section 3:14) and in the GALA (section 3:1(2)). Hence, a combination of the applicability of public and private law standards is a rather common phenomenon in Dutch law.

As to the applicability of substantive public law standards it is important to distinguish the classical administrative authorities from other administrative authorities.⁷⁴ *Classical* administrative authorities must comply with public law standards regardless of the nature of their acts, e.g. public or private (buying computers), juridical or merely factual (informing the public). As to the *other* administrative authorities, however, according to the GALA the public law standards only apply in as far as they are administrative authorities, which means in as far as they are invested with public authority. Hence, the other administrative authorities only have to take public law standards into account to the

⁷¹ ABRvS 29 September 1994, (1995) AB 210.

⁷² M. Scheltema and M.W. Scheltema, *Gemeenschappelijk recht: Wisselwerking tussen publiek- en privaatrecht*, 2nd edn. (Alpen aan den Rijn 2008), 6.

⁷³ HR 24 April 1992, (1992) AB 542; (1993) NJ 232 (Zeeland/Hoondert).

⁷⁴ The concept of administrative authorities in Dutch law is a general concept which is codified in the GALA and is applied in the entire area of administrative law. Therefore, the interpretation given to this concept, considered in the previous section, as to the amenability to appeal is also relevant for the applicability of the principles of proper administration.

extent that they take decisions; as to other kinds of acts they can behave like every private legal person. Thus, the GALA system is very comparable with the system of the Human Rights Act 1998 in English law on which we will focus later.

C. Human Rights in Dutch Law

The second set of public law standards which should receive attention are fundamental rights or human rights. Since their primary function is to protect individuals against public or administrative authorities, their applicability is of the same nature as demonstrated in the former subsection focusing on the public law standards in the GALA and the general principles of proper administration. Upon the general reform of the Dutch Constitution in 1983, the Government stated that all public bodies are subject to the fundamental rights of the Constitution, regardless of the nature of their acts, including, in particular, private law acts.⁷⁵ Thus, in the *Rasti Rostelli* case the Supreme Court held that the freedom of religious belief and practice prohibited the municipal authorities of a small town (with a major orthodox protestant community) from refusing to let a municipal hall to an artist whose performance they objected to solely on religious grounds.⁷⁶

In principle, the impact of human rights on legal relations between private legal persons is also accepted. The acceptance of this so-called “horizontal effect” was again stated in the general constitutional reform in 1983,⁷⁷ although it is still not undisputed in Dutch legal doctrine.⁷⁸ The actual horizontal applicability of each fundamental right should be considered on a case by case basis. Moreover, different levels of horizontal effect can be distinguished.⁷⁹ Merely an indirect horizontal effect is met when a fundamental right gives a certain direction to the interpretation of a private law provision. On the other hand, a full direct horizontal effect is met when the courts apply human rights directly – taking account of the statutory limitation clauses – in relationships between individuals. There is no strict division of the different levels of horizontal effect; it is rather a sliding scale. Since the Netherlands has a monistic system for the implementation of

⁷⁵ *Kamerstukken II*, 1975/76 (Parliamentary Documents, Second Chamber), 13,872, no. 3, p. 15.

⁷⁶ *Rasti Rostelli*: HR 26 April 1996, (1996) AB 372; (1996) NJ 728.

⁷⁷ *Kamerstukken II* (Second Chamber) 1975/76, 13 872 no. 3, pp. 15, 16. See E.A. Alkema, “Chapter 16 Constitutional Law” in J.M.J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch Law* (Alphen aan den Rijn 2006), 307.

⁷⁸ C.A.J.M. Kortmann, *Constitutioneel recht*, 6th edn., (Deventer 2008), 389 ff. L.F.M. Besselink, “Voetangels en klemmen: de horizontale werking van burger- en politieke rechten”, in C. Flinterman and W. van Genugten (eds.), *Niet-statelijke actoren en de rechten van de mens: gevestigde waarden, nieuwe wegen* (The Hague 2003), 3. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, pp. 104 ff.

⁷⁹ See e.g. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, pp. 106 ff.

international law, the horizontal effect is similar for international human rights.

Analyzing Dutch case law, few cases can be found in which human rights are applied *explicitly* in relations between private legal persons. The famous Dutch case on horizontal effect is the *AIDS test* case.⁸⁰ In this case a rape victim claimed that the court should order the rapist to undergo an AIDS test so that she would know whether she might be contaminated with HIV. The rapist referred to his fundamental right of physical integrity. The Supreme Court accepted the horizontal effect of this fundamental right in principle, although in this case the interest protected by this fundamental right was weighed against the victim's justified interests. More cases can be found in which human rights give a certain direction to the interpretation of a private law provision, such as the provisions concerning "wrongful acts".

D. Comparison between Dutch and English Law as to the Effect of Substantive Law

Below we take a look at the applicability of public law standards in English law and draw a comparison between the two legal systems. It is important to realize that whenever the full horizontal effect of human rights becomes more accepted practice, the less important the debate about the public-private law divide will become. After all, with full horizontal effect human rights are also applicable to non-public authorities and thus the public-private law divide is no longer relevant.

English law has not generally accepted the horizontal effect of human rights, although there is some discussion as to the applicability of human rights in horizontal relationships.⁸¹ Like in Dutch law concerning the applicability of the general principles of proper administration, in English law the applicability of human rights depends on the type of administrative authority. The definition of "public authorities" to which the HRA applies can be found in section 6 HRA. A first category of "public authorities" is the so-called "core public authorities" ("classical" public authorities; a Minister, a County Council

⁸⁰ HR 18 June 1993, (1994) NJ 347. See for an English translation: L.F.M. Besselink (ed.), *Constitutional Law of the Netherlands: An Introduction with Texts, Cases and Materials* (Nijmegen 2004), 159.

⁸¹ In favour of a horizontal effect appears to be, for example, H.R.A Wade & C.F. Forsyth, *Administrative Law* (Oxford 10th ed., 2009), 160. There is also the view that because the courts are "public authorities", they are obliged to apply human rights in relationships between individuals. In addition to this there is the view (for example, Oliver, "Functions of a public nature under the Human Rights Act", note 59 above, p. 334) that on the basis of the ECHR the participating states are obliged to design a legal system in which individuals are protected against the violation of their rights by other individuals. Consequently, it would not have been necessary to design a special regime for public authorities. Indeed, one can find a few cases in which the courts practise some kind of horizontal approach (*Douglas v Hello!* concerning privacy). However, there is no general acceptance of a horizontal effect.

etc.). It is not necessary to classify the actions of these public authorities, because the HRA applies to all their actions (also, for example, to buying computers). A second category is the so-called “hybrid public authorities”, which are described in section 6 (3) (b) HRA as “any person certain of whose functions are *functions of a public nature*”. The HRA only applies to these authorities in as far as they can be classified as “hybrid public authorities”- when they are performing a function of a public nature. Moreover, in section 6 (5) HRA it is stated that in relation to a particular act, a person is not a public authority by virtue of only subsection (3) (b) if the nature of the act is private. It turns out that this system is based on a scheme similar to the Dutch scheme on the applicability of substantive public standards: for classical public authorities the HRA is applicable to *all* their actions; to hybrid public authorities the HRA only applies in as far as they perform functions of a public nature.

The interpretation of “hybrid public authorities” is of great importance for the applicability of the HRA to private or privatised organisations. For several years there has been robust discourse as to the scope of this definition.⁸² Although there is a certain similarity between the tests in the context of judicial review and the tests in the context of the HRA, the concept of a “public function” in both contexts should not be identified. An important note is that the test whether a body is exercising a function of a public nature in the context of the HRA is only relevant for the so-called hybrid public authorities. As seen in the context of judicial review, reading the CPR gives the impression that for the amenability to judicial review, the public function test is a general test which should always be applied. If we consider this to be true, a logical conclusion would be to qualify all activities performed by core public authorities which have been proven to be amenable to judicial review as performances of a public function.⁸³ From this point of view a logical argumentation would be that the transfer of activities from a core public authority to a private body does not change the

⁸² See e.g. P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review” (2002) 118 L.Q.R. 551; Elizabeth Palmer, “Should public health be a private concern? Developing a public service paradigm in English law” (2002) 22 O.J.L.S 663; Maurice Sunkin, “Pushing forward the frontiers of human rights protection: the meaning of public authority under the Human Rights Act” [2004] P.L. 643; Dawn Oliver, “Functions of a public nature under the Human Rights Act” [2004] P.L. 329; Peter Cane, “Church, state and human rights: are parish councils public authorities?” (2004) 120 L.Q.R. 41; Helen Quane, “The Strasbourg jurisprudence and the meaning of a “public authority” under the Human Rights Act” [2006] P.L. 106; S. Palmer, “Public private and the Human Rights Act 1998: an ideological divide” [2007] C.L.J. 559; Jonny Landau, “Functional public authorities after *YL*” [2007] P.L. 630; C.M. Donnelly, *Delegation of Governmental Power to Private Parties. A Comparative Perspective* (Oxford 2007), 245 ff. See also two reports of the Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (Seventh Report of Session 2003–04, London: HMSO 2004 and Ninth Report of Session 2006–07, London: HMSO 2007).

⁸³ Oliver however warns against this kind of reasoning, see Oliver, “Functions of a public nature under the Human Rights Act”, pp. 346–348.

public-function character of this activity.⁸⁴ However, this was not the conclusion of the House of Lords in the *YL* case in 2007,⁸⁵ where a private body exploiting a care home was held not to be performing a public function. Therefore, there are two possible conclusions. Either the CPR test of the public function is not the general test it purports to be (proof for this conclusion is that it is seldom used in cases concerning core public authorities acting on a statutory basis) or the meaning of a “public function” in the context of judicial review is different from the meaning of a “function of a public nature” in the HRA.⁸⁶ Whatever the right conclusion may be, the *YL* case has generated a great deal of criticism regarding the House of Lords’ explanation of a “function of a public nature”. It is interesting to see that the case argumentation is partly dogmatic and partly political and pragmatic. Shortly after this ruling it was explicitly stated in the Health and Social Care Act 2008 that the kinds of organisations concerned in the *YL* case should, for the purpose of the HRA, be considered to be hybrid public authorities. This kind of intervention by the legislature – to make fundamental rights directly applicable by qualifying the specific body as a public authority – is not as yet of a generic nature. The same discussions could still arise in other fields, for example in the field of education or health care.⁸⁷

Transferring the *YL* case to the Dutch context, the Dutch courts would never categorise a private care home like Southern Cross as an administrative authority. The question as to the legal qualification of Southern Cross as a public or private authority would not even arise. Therefore, the House of Lord’s conclusion in the *YL* case comes as no surprise from a Dutch point of view; on the other hand, the intervention in the Health and Social Care Act 2008 is very surprising! As demonstrated earlier, in Dutch law the general principles of proper administration are only applicable to administrative authorities. Thus, the general principles of proper administration would not be applicable in a similar case in Dutch law.

However, whether or not a private care home is labelled as an administrative authority does not imply that, according to Dutch law, human rights would not be applicable in this case. As seen before, in Dutch law there is some space for a horizontal approach of human

⁸⁴ See in this sense: P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review, p. 556.

⁸⁵ *YL v Birmingham City Council* [2007] UKHL 27; [2007] 3 W.L.R. 112.

⁸⁶ However, it should be noted that prior to the *YL* case several courts had already ruled that similar decisions by private bodies as emerged in the *YL* case were not amenable to judicial review. See *R v Servite Houses, ex parte Goldsmith* [2001] 33 H.L.R. 35 and *R v Leonard Cheshire Foundation, ex parte Heather* [2002] ECWA Civ 366.

⁸⁷ Thus it is interesting to note that Lord Neuberger in his opinion in the *YL* case ([2007] 3 W.L.R. at 164) already took a shot across the bows: in his view the provision of health or education services in a private school or hospital would not obviously be considered as a function of a public nature.

rights, although the scope of the horizontal effect of human rights is still in dispute. Therefore YL's claim for one's private life, family life and home to be respected could in Dutch law very well be successful against a private party like a care home.

E. Possible Explanations for the Differences between English and Dutch Law

It is remarkable that in English law the labels "public law" and "public authority" are used in a wider sense than in Dutch law. Again, it is worthwhile searching for explanations for the differences between English and Dutch law.

First, since Dutch law is more generous in its interpretation of the horizontal approach to fundamental rights or human rights, there is no need to use the label "public" for private parties which exercise a public function in order to lean towards the applicability of these rights. Moreover, public law standards also apply to the private law acts of classical administrative authorities, so there is no need to categorise these acts as "public law acts" in order to realize the applicability of these public law standards. Another explanation is somewhat more technical and focuses on the remedy approach which is more dominant in English law. While there is a statutory duty for a public authority to arrange and fund housing and care for elderly people (as it was in the YL case), an individual could instigate a claim against the local authority – in Dutch law based on a wrongful act – for not having made the kind of arrangements that comply with, for example, article 8 ECHR. However, it is doubtful that instigating such a claim in Dutch law would prevent the claimant being removed from the home; most probably it will result in financial compensation. Yet, in Dutch law in a case like YL financial compensation would be considered – unlike in English law – a sufficient remedy. It seems that in English law this approach, which would require the acceptance of damages paid by the local municipality as a substantive and sufficient remedy, is not considered as an acceptable solution. Therefore, English law is searching for a means of redress against the private organisation with responsibility for the care home. This might explain the need for the qualification of the private care home.

V. CONCLUDING REMARKS

Both in the English and in Dutch legal system the distinction between public law and private law has turned out to be a distinction which is used for different purposes. Thus the distinction appears to be, what we would like to call, a multifunctional distinction. Moreover, the distinguishing markers differ depending on the purpose of the distinction.

Thus the distinction is not only found to be multifunctional but also context-dependant.⁸⁸ In English law this is most clear looking at the public function test in the context of judicial review and in the context of the HRA. However, although a different understanding of the labels “public” and “private” can be accepted in the light of the multifunctional and context-dependant character of this distinction, it does not deserve the beauty prize within the ideal of a coherent legal system.

The context-dependant character of the public-private distinction can also be demonstrated by referring to the results of the comparison of Dutch law and English law. In the former sections we have demonstrated that the choices drawing the line between public and private law differ in respect of the context of the legal system in which the division applies. Therefore, considering the Dutch legal system, the demands for using the label “public” differ from the demands of English law. An example of this can be found in the (compared to English law much greater) possibility of obtaining judicial protection in a civil procedure based on the wrongful act doctrine, which decreases the necessity to qualify a case as a public law case in order to obtain judicial protection in a procedure before the administrative court (lacking such possibilities in English law, the Take-over panel in the *Datafin* case was held to be amenable to judicial review). The same holds true for the applicability of human rights, since Dutch law is more generous in accepting a horizontal effect of these rights. All this explains why the label “public law” in Dutch law is used in a narrower sense than in English law. Regarding public law as a continental label, English law would seem to be more Catholic than the Pope!

How does one evaluate these findings? It is rather remarkable that in the Dutch legal system – a system in which, compared to the English system, the public-private law divide is historically more deeply rooted and in which public law is more settled – the label “public law” is used in fewer kinds of cases than in the English legal system, particularly concerning the transfer of power to private bodies. This is different from what might be expected on the surface. After all, English law has or has had quite some aversion towards the public-private law divide and the divide has only recently become more important. Against this background it is surprising to find that the area of public law has taken up a rather large space.

We have noticed that the public-private law divide in English scholarly writing is often presented as a solid dichotomy. However, we have demonstrated that both in a continental legal system like the

⁸⁸ G.T.J.M. Jurgens and F.J. van Ommeren, *De opmars van het onderscheid tussen publiekrecht en privaatrecht in het Engelse recht* (The Hague 2009), 108–110.

Dutch legal system and in a common law legal system like the English legal system, the public-private law divide is not unambiguous. This observation does not lead to the conclusion that the division is not workable; our thesis is that a more productive and more clarifying approach is to consider the public-private divide as a *multifunctional and context-dependant divide*.